in the

Supreme Court

of the

United States

____TERM, 1978

No. 78-645

THOMAS CLINTON MARTIN and
THOMAS RAY MARTIN

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

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The petitioners, THOMAS CLINTON MARTIN and THOMAS RAY MARTIN, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 16, 1978. Petition for Rehearing was denied August 18, 1978.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 574 F.2d 1359 (Appellate Number 77-2884, reported June 16, 1978) and is attached hereto as Appendix A. The Order denying Petition for Rehearing En Banc, is reported at 579 F.2d 643 (dated August 18, 1978) and is attached hereto as Appendix B.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was made and entered on June 16, 1978, and a copy thereof is appended to this Petition in Appendix A. The Order of the United States Court of Appeals for the Fifth Circuit denying a Petition for Rehearing En Banc was made and entered August 18, 1978, and a copy thereof is appended to this Petition in Appendix B. Jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254 (1), and Rule 19, United States Supreme Court Rules.

QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause of the Fifth Amendment bars prosecution and punishment for the crime of criminal conspiracy committed in a foreign nation wherein the petitioners were previously sentenced and convicted for the same offense, based upon the same allegations, overt acts and evidence.

2. Whether a prosecution for conspiracy to violate drug laws in one nation would bar a subsequent prosecu-

tion for the same offense in the United States since both prosecutions were encompassed by an international agreement and thus, vitiate the same sovereign element of the defense of double jeopardy.

3. Whether the conviction of the petitioners was obtained in violation of established federal policy against multiple prosecutions for the same offense, and for that reason should be set aside.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION— FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TITLE 21, UNITED STATES CODE, SECTION 963

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the

commission of which was the object of the attempt or conspiracy.

THE BAHAMAS DANGEROUS DRUGS ACT CHAPTER 223, SECTION 14 (1)

Upon the production of an import certificate duly issued by the competent authority in any country, it shall be lawful for the Minister to issue an export authorization in the form B set out in the Schedule hereto in respect of any drug referred to in the import certificate to any person who is named as the exporter in such certificate, and is, under the provisions of this Act, otherwise lawfully entitled to export such drug from the Colony. The export authorization shall be prepared in triplicate and two copies shall be issued to the exporter, who shall send one copy with the drug to which it refers when such drug is exported. The Minister shall send the third copy direct to the appropriate authority of the country of ultimate destination. Where the intended exportation is to a country which is not a party to the Convention, it shall not be necessary to produce an import certificate as aforesaid. In all cases it shall be in the absolute discretion of the Minister to issue or refuse an export authorization, as he may see fit.

THE BAHAMAS DANGEROUS DRUGS ACT CHAPTER 223, SECTION 15 (1)

An import authorization in the form C set out in the Schedule hereto permitting the importation into the Colony of any dangerous drug specified therein may be granted by the Minister subject to such conditions as he shall deem fit to any person who may lawfully import such drug.

THE BAHAMAS PENAL CODE CHAPTER 48, SECTION 89 (1)

If two or more persons agree or act together with a common purpose in committing or abetting an offense whether with or without any previous concert or deliberation, each of them is guilty of conspiracy to commit or abet that offense as the case may be.

STATEMENT

The petitioners, THOMAS CLINTON MARTIN and THOMAS RAY MARTIN, were indicted in the United States District Court for the Southern District of Florida for violation of Title 21 U.S.C. §963 charging that petitioners at a time unknown to the Grand Jury and continuing until on or about August 15, 1975, in the Southern District of Florida, the Bahama Islands, along with other defendants, did knowingly and intentionally combine, conspire and confederate to import quantities of marijuana into the United States from a place outside thereof, and also to possess with intent to distribute quantities of marijuana.

The petitioners were found guilty by the court, upon a waiver of trial by jury, based upon a stipulated statement of facts and testimony of the petitioners. They were subsequently sentenced and fined pursuant to the split-sentence provision of Title 18 U.S.C., Chapter 231, Section 3651. The petitioners appealed the judgments of convictions in the United States Court of Appeals for the Fifth Circuit wherein the convictions were affirmed. A petition for rehearing en banc was also denied.

1. Stipulated statement of facts.

In early May of 1975, Earl Wayne Jordan met with Benjamin Russell in Freeport, Bahamas and gave him $5,000 to assist him in stashing, guarding and moving a large load of marijuana they were expecting from Colombia.

On about May 15, 1975, Earl Wayne Jordan called Benjamin Russell in Freeport and told him that some men were going to see him a couple of days later.

Some days later Martin Carl Haas and Roger DeCamp went to Freeport and met with Russell and advised him they were going to bring a boat to Freeport.

On June 13, 1975 Benjamin Russell met with Gordon Haas, Martin Haas, Robert Olinski and Michael Guthrie. When they arrived in Freeport, onboard a vessel named the "TEA TIME", Russell was told by Martin Haas and Roger DeCamp that they wanted to take the "TEA TIME" to Deep Water Cay where they were supposed to meet a Colombian vessel bringing the marijuana.

The "TEA TIME" was to be used as sleep-in quarters for these people once the marijuana was unloaded and they were guarding it.

Russell and the others took the "TEA TIME" to Deep Water Cay where they met two other men identified as Thomas Clintin Martin and Thomas Ray Martin, who were onboard a Nova boat. These two individuals were also to assist them in unloading the marijuana.

Two or three days after June the 13th, 1975, the Colombian vessel arrived off the coast of Freeport, Bahamas, and unloaded onto Black Rock Cay, approximately 90,000 pounds of marijuana. Gordon Haas, Roger DeCamp and other persons stayed there to guard the stash.

On July 1, 1975, Gordon Haas, Thomas Clinton Martin, Thomas Ray Martin, transported approximately 80 bags or approximately 5,000 pounds to Riding Point, where they expected a DC-3 aircraft to pick them up. On July 1, 1975, the DC-3 aircraft was to have left Fort Lauderdale and gone to Grand Bahamas Island. Because of bad weather the trip was postponed.

On July 2, 1975, the DC-3 departed Fort Lauderdale at approximately 11:30 P. M. with Joseph Able, Sr., Larry Whittington, Alfred Lavoie and James Gibson onboard, for Grand Bahamas Island and picked up the 80 bags of marijuana. The DC-3 was followed by Federal agents from Grand Bahamas Island until it landed at Palatka, Florida.

As a surveillance aircraft landed in Palatka to effect the arrest of the people onboard, the DC-3 took off, nearly colliding with the surveillance aircraft. On the ground, 2,000 pounds were found by Federal agents and two trucks registered to Harold Miller and U-Haul trailer attached to one of the trucks. Inside the truck was found a rental agreement for the trailer made by Dwight Simpson Burke.

On the early morning of July 3, 1975, a Sheriff's Department deputy stopped two males identified as Dwight Simpson Burke and John Henry Jordan, not far from the airport, going back to where the aircraft departed Palatka. Once it was back up in the air, surveillance aircraft started following it again. It flew to the Lakeland-Bartow area where it circled before landing in Lakeland.

Upon landing, Joseph Able, James Gibson, Alfred Lavoie, Larry Whittington and John Frederick Steuber were arrested. A search of the aircraft revealed traces of marijuana and a gun belonging to Able. Subsequent to the arrest, Able contracted Earl Wayne Jordan and advised him they had been arrested and requested he provide bond money and a lawyer. He also advised him that his brother had gotten away all right.

Days subsequent to the arrest on July 3, local authorities were able to locate approximately 2,500 pounds scattered around the Bartow area which had been dumped from the aircraft on August 10th and 11th.

Benjamin Russell, Martin Haas, Gordon Haas, Roger DeCamp, Thomas Clinton Martin and Thomas Ray Martin attempted to move the marijuana from Black Rock Cay. It was to be picked up by helicopter and some boat that the Martins had. As they prepared the helicopter to land, the landing lights were turned to the helicopter. It approached and before it could land it crashed into the water. Able, the pilot aboard the helicopter, was thrown from the helicopter and subsequently picked up by the Haases. After the accident, Able was returned back to the States and efforts were made to pull the helicopter into deep water and have it sink. It was discovered, however, by the Bahamian authorities and then the investigation was initiated.

A subsequent search of the Cay, close to the crash, resulted in the seizure of 86,000 pounds of marijuana which was seized by Bahamian authorities.

2. Testimony of petitioners.

While relying on exhibits which were attached to motions to dismiss, Thomas Clinton Martin testified on his own behalf, stating that he and his son, Thomas Ray Martin, arrived in Freeport, Grand Bahama Island, on September 12, 1975, at which time they were arrested by Bahamian authorities for conspiracy to import marijuana, conspiracy to export marijuana and possession of marijuana. After being transported to the police, C.I.D. barracks, in Freeport, the petitioner was taken into the back room of the police station by three men: Mr. Bannister, Sgt. Bain and a real tall black man. He was thereupon handcuffed with his hands behind his back and Mr. Bannister asked him what he knew about some marijuana at Black Rock Cay and the petitioner said "Well, sir, before I tell you anything I would like to talk to a lawyer first", and he was thereupon hit in the stomach very hard by Mr. Bannister who told him that he wouldn't see a lawyer until he said so and that the petitioner would answer questions he was asked one way or the other. He was then hit again by Mr. Bannister and he said I do not know anything about the marijuana and didn't say anything so the tall black man started beating him. The sergeant never hit him at that time. The tall black man then hit the petitioner with the side of his hand in the petitioner's jaw and knocked him down and the cap fell off his tooth. While on the floor, Mr. Bannister kicked him in the stomach very hard. He did not use an object but merely his feet. The petitioner was then picked up by Sgt. Bain who helped him and he was then hit a few more times. The handcuffs were removed and he was taken back into the room and Sgt. Bain removed the handcuffs whereupon his son was taken into the room. The petitioner sustained injuries to

his intestines and as a result of the kick to his stomach defecated in his clothes. His intestines did not work for well over a week and additionally he was required to go to court in the same clothing wherein he had previously defecated.

The petitioner was contacted by U.S. agents who talked to and questioned him for about two hours.

A couple of days later, two other United States agents talked with the petitioners for a long time, at which time they were told that the petitioners had been beaten badly and wanted to talk to a lawyer; but, petitioners were advised the agents had no jurisdiction to obtain a lawyer. The petitioner discussed with the agents an offer by Inspector Bannister of the Bahamian Police to plead guilty upon signing a statement in order to avoid any additional beatings and to return to the United States. The petitioner was told that they knew Mr. Bannister and assured him that he was a man of integrity.

On September 14, 1975, after the agents left, Mr. Bannister told Thomas Clinton Martin that he would be fined $1500.00 and then be deported. The petitioner then went to court, entered a plea of guilty to all three offenses, was fined $1500.00 and sentenced to two years imprisonment.

While incarcerated at Fox Hill Prison, petitioner was contacted by Assistant United States Attorney Ferguson and DEA agents on four separate occasions and was advised that in exchange for his testimony against a co-petitioner, Earl Jordan, he would be released from Fox Hill Prison and be given immunity in

the states. After expressing a fear for his life, and protection offered by the Government, petitioner said he would consider same, but was not contacted again.

Thomas R. Martin also testified as to the foregoing facts as did his father, Thomas C. Martin. Additionally, he stated that after his father was taken into Mr. Bannister's office and remained there about fifteen or twenty minutes he came out and didn't look too good. He was carried over to another part of the building there and then he, Thomas R. Martin, was taken into the room by Mr. Bannister who screamed and threatened him by saying "I have a statement by Ben Russell that you did this, that and the other, and I don't want you, you are just little people and I want to know all the big people, and you tell me what I want to know", and, you know "you and your father both just go free". The petitioner didn't say anything and then Mr. Bannister started hitting him in the torso area, basically in the stomach with his fist. The petitioner also defecated in his pants after which he went into a convulsion. At that point the beating stopped. He was thereupon transported to a jail house in Freeport and put in a little solitary confinement area. The statement given by Thomas R. Martin was handwritten after being supplied with an original statement to copy. He did so after he was told "sign this statement and you will go home". He also entered a plea of guilty to all three offenses and was fined $1500.00 and sentenced to two years imprisonment.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed by this Court for the following reasons:

A. THE DECISION BELOW IS CONTRARY TO THE RIGHTS AND PROTECTIONS OF THE FIFTH AMENDMENT.

It is axiomatic from exhibits introduced to the trial court that Title 21 U.S.C. §963 is substantially the same as Chapter 48, Section 89 (1) of the Bahamas Penal Code, and that the indictment alleged overt acts committed by these petitioners solely outside the territorial limits of the United States, while in a foreign nation, to wit: Bahamas. Furthermore, the uncontradicted affidavit of the petitioners; record of the proceedings and plea of guilty by petitioners before Mr. Kenneth Mc Allister, Stipendiary and Circuit Magistrate for the District of Freeport, Grand Bahamas; stipulated statement of facts introduced in lieu of testimony in the Governments' case in chief as well as testimony of petitioners demonstrates unequivocally that the facts utilized in both jurisdictions to prove the guilt of these petitioners were identical.

1. Both prosecutions Were for the Same Offense.

In the case at bar, it is fundamental that the exact language employed in the United States and Bahamian Statutes is not identical. "It has long been understood that separate statutory crimes need not be identical — either in constituent elements or in actual proof — in order to be the same within the meaning of the constitutional prohibition." *Brown v. Ohio,* 97 S.Ct. 2221 (1977).

It is interesting to note that the very offense of drug trafficking is unique and any evidence of distinctiveness to which the Government may allude would not be considerable since "it is not at all clear in this case whether there is any difference between the two conspiracies with respect to such key factors as the 'principals, the source of the drugs, the means and places of importation, their distribution points, and the centers from which they operate . . . *United States v. Mallah*, 503 F.2d 971, 986 (2d Cir. 1974)."

In the case of *In re Nielsen*, 131 U.S. 176, 187-188 (1899) this Court held that:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which each other does not . . .

In the case at bar no other fact was necessary nor was it introduced. Overt act number three (3) in the indictment alluded to acts committed by the petitioners while in Freeport, Grand Bahama Island in furtherance of the conspiracy. It was that act which was charged by the Bahamian authorities and testified to in both trials.

2. Autrefois Convict.

Mr. Justice McLean in *United States v. Shoemaker*, 27 Fed. Case No. 16,279 (1840), stated that "The plea of *autrefois acquit* consists of matter of record, and matter of fact. Of record, the Indictment

and acquittal, of fact the petitioner is the same person, and that the offense is the same." The foregoing likewise, ". . . , may be said of the plea of *autrefois convict*. In either case, where the record offered shows on its face the identity or nonidentity of person and offense the question is one of law for the Court . . ." *Short v. United States*, 91 F.2d 614, 624 (4th Cir. 1937).

The factual analysis of the record and the preamble relating to the time period of the alleged conspiracy in the indictment in the within cause, readily reveals that both offenses, are one in the same. The conspiracies allegedly terminated "on or about August 15, 1975" upon the finding of the cache of marijuana on two cays in the Bahamas:

> It is well settled that where a continuing offense such as conspiracy is charged as having been committed within a stated period, an acquittal or conviction will bar another prosecution for the same offense alleged as having been committed within a period which overlaps any part of the former period. The reason is that proof of the commission of the offense during the overlapping period is sufficient to sustain a conviction under either of the indictments, and the accused is thus subjected to double jeopardy as to the offenses committed within that period. *Short supra*, at 620.

The issue herein which involves the plea of *autrefois convict* has been held in a unanimous opinion to be applicable in any civilized state in *United States v. Furlong*, 18. U.S. (5 Wheat) 184 (1820) wherein the Court specifically alluded to what is submitted as "international double jeopardy".

> Robbery on the seas is considered as an offense within the criminal jurisdiction of all nations. It is against all and punished by all; and there can be no doubt that the plea of *autrefois acquit* would be good in any civilized state, though resting on a prosecution instituted in the court of any other civilized state. *Furlong supra* at 197.

It is submitted that in light of the Single Convention on Narcotic Drugs, 18 U.S.T. 1407 (1967), commonly known as the Single Convention, to which the United States and the Bahamas are signatories, and its' purpose, that the rule in *Furlong* should be held to be applicable to drug offenses, especially in the case at bar wherein the specific offenses contemplated by the Single Convention have been codified by both nations. Therefore, the duel sovereignty test would be inapplicable.

3. Comity of Valid Judgement.

The doctrine of comity has been relied upon by this Court and other federal courts throughout this country in treating valid judgments of courts of foreign countries: ***Ritchie v. McMullen,*** 159 U.S. 235 (1895) [Comity required Canadian judgment be treated as conclusive when sued on in a federal court]; ***Enis v. Smith,*** 14 How. 400 (1852) [held Lithuanian decree containing the geneological chart of descendents was a foreign judgment in rem and was evidence of the facts adjudicated against all the world]; ***Harrison v. Triplex Gold Mines,*** 33 F.2d 667 (1st Cir. 1929) [judicial decree of one nation should be allowed to operate within the dominion of another nation on basis of comity]; and ***Gior v. Westervelt,*** 116 F. 1017 (CC N.Y. 1902) [comity had induced American courts to accept as *res judicata* the judgment of courts of foreign countries].

The applicability of the doctrine to valid civil judgments likewise has its' place in criminal law.

4. Applicable British Law.

The doctrine applicable to criminal matters *nemo debet bis priniri pro uno delicto* was discussed in *Paley on Summary Convictions,* (1904) by Macnamara and Nevill, Sweet Maxwell, Ltd., London:

> Consequently at common law a former conviction or acquittal, whether on a criminal summary proceeding or an indictment, will be an answer to an information of a criminal nature before justices founded on the same facts. The true test to show that such previous conviction or acquittal is a bar, is whether the evidence necessary to support the second proceeding would have been sufficient to procure a legal conviction on the first.
>
> Even if the second charge be differently formed, but based on the same facts, it will be answered by the defence of *autrefois acquit* or *autrefois convict,* at 167-8.

The foregoing case book law has been definitely settled by at least three clearcut decisions rendered more than two hundred years ago and prior to the American Revolution.

In *R. v. Thomas*, 1 Sic. 179, 82 Eng. Rep. 1043, 1 Lev. 118, 83 Eng. Rep. 326; 1 Keb. 663, 83 Eng. Rep. 1172 (K. B. 1662), the defendant was tried and acquitted in Wales and subsequently indicted for the same offense in England. The King's Bench held: "it was at length resolved by the whole court, that the defendant should be discharged since *autrefois acquit in les Marches de Gales est bone plea reg in Angleterre.*"

The leading unreported case, *R. v. Hutchinson*, 3 Keb. 785, 84 Eng. Rep. 1011 (K. B. 1678) therefore, a discussion must be had on basis of cases wherein it was discussed: Hutchinson killed Colson in Portugal where he was acquitted, he was thereupon brought to England where he produced an exemplification of the Record of his acquittal to the Court of the King's Bench. The Judges held that since he had already been acquitted of the charge he could not be tried in England. See *R. v. Roche*, 1 Leach 134, n.a., 168 Eng. Rep. 169 (K. B. 1775) which relied largely upon the discussion of the case in *Beak v. Thyrwhit*, 3 Med. 194, 87 Eng. Rep. 124 (K. B. 1688).

The facts of *Roche*'s case, *supra*, are similar to *R. v. Hutchinson*. Captain Roche was indicted for the murder of John Ferguson, at the Cape of Good Hope, on the Coast of Africa. Captain Roche "pleaded *autrefois acquit* before Oloff Martini Bergh, Provinicial Fiscal of the (Dutch) Supreme Court of Criminal Jurisprudence there." The prosecution requested "that the Jury might be charged at once with this issue, and that of not guilty." The Court refused, explaining that "would lead to this absurdity, that being charged with both, they would be obliged to find upon both, and yet of the first finding was for the prisoner they could not go to the

second because the finding would be a bar." The prosecution put in a replication; defendant for reasons not given withdrew the plea in bar, and he was acquitted on the general issue.

More recently in *R. v. Aughet*, 26 Cox Cr. 232, 238, 13 Cr. App. R. 101, 109, 22 J. P. 174, 176; 118 L.T.R. 658, 660, 34 T.L.R. 302, 305; (1918) the defendant was a Belgian officer stationed in England when he wounded a Belgian private. He was arrested by British police and subsequently turned over to Belgian authorities where he was tried by a Belgian Court-martial and acquitted. He was subsequently returned to England for trial on the murder when he relied upon the plea of *autrefois acquit*. The Court held, "A judgment of a foreign court of competent jurisdiction is, apparently, universally respected as a final conclusion of the matter by rule of international comity, if not law."

The foregoing cases are clear in light of the fact that they were decided unanimously by the judges on the King's Bench. Therefore, courts throughout the British Empire (Bahama Islands included) have subscribed to the rule that common law rights do not terminate outside of sovereign boundaries.

B. THE FAIRNESS CONCERN OF THE *PETITE POLICY* IS APPLICABLE TO SUCCESSIVE FEDERAL PROSECUTIONS INVOLVING FOREIGN NATION-STATES.

This Petition presents a significant question concerning the application of the *Petite Policy* of the Department of Justice to successive federal prosecutions

and convictions by a foreign nation for the same offense. See *Petite v. United States*, 361 U.S. 529 (1960).

As a result of this Court's decisions relative to the duplication of federal-state prosecutions and prosecutions arising out of the same transaction, the Department of Justice formulated the *Petite Policy* requiring a United States Attorney contemplating prosecution to obtain authorization from an appropriate Assistant Attorney General. In the instant case, the Government never complied with the foregoing. In *Rinaldi v. United States*, ___U.S.___, 98 S.Ct. 81, 54 L.Ed.2d 207 (1977), this Court concluded that summary disposition was appropriate in deciding a claim that a prosecution was obtained in violation of established federal policy against multiple prosecutions for the same offense.

In discussing the rationale behind the implementation of the *Petite Policy* and its relation to the Double Jeopardy Clause, this Court in *Rinaldi* concluded that:

> The Petite policy was designed to limit the exercise of the power to bring successive prosecutions for the same offense to situations comporting with the rationale for the existence of that power. Although not constitutionally mandated, this executive policy serves to protect interest which, but for the 'dual sovereignty' principle inherent in our federal system would be embraced by the Double Jeopardy Clause.

The Fifth Circuit Court, in the case at bar determined that the Double Jeopardy Clause was inapplicable while relying on case decisions involving

federal-state prosecutions. Yet, in regard to petitioner's contention that the executive policy was implemented to "protect(ing) the citizen from any unfairness that is associated with successive prosecutions based on the same conduct" *Rinaldi, supra*, 98 S.Ct. at 84, the lower Court determined that the policy only applied to successive federal-state prosecutions and not to convictions by a foreign nation. It further concluded that the case *sub judice* did not meet the "same offense" test set by this Court in determining the applicability of the *Petite Policy*. The foregoing is clearly erroneous in light of the record.

It is respectfully submitted that the decision below is contrary to the view of fundamental fairness in criminal prosecutions. There can be no question but that the Bahamas and the United States, with the assistance of each other; investigated, prosecuted and convicted the petitioners for the same acts and offenses. But for the assurances of the U.S. agents to the petitioners in regard to the integrity of the Bahamian officials, pleas of guilty may not have been entered. They have been both placed twice in jeopardy contrary to: common and British law as well as the policy espoused in *Petite* and *Rinaldi, supra*.

CONCLUSION

For the reason set forth in this Petition and based upon the cases cited therein, the Petition for Writ of Certiorari should be granted and the Judgment of the Court of Appeals reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, LAWRENCE S. KATZ, Attorney for THOMAS CLINTON MARTIN and THOMAS RAY MARTIN, Petitioners herein, being a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 16 day of October, 1978, I mailed copies of the foregoing Petition for Writ of Certiorari, on the several parties thereto as follows:

1. On the United States by depositing a copy of same addressed to KAREN L. ATKINSON, Esquire, Assistant United States Attorney, 701 Clematis Street, West Palm Beach, Florida, in the United States mail with sufficient postage prepaid.

2. On the Solicitor General of the United States by depositing a copy of same addressed to him at the United States Department of Justice, Washington, D.C. 20530, in the United States mail with sufficient postage prepaid.

LAWRENCE S. KATZ, ESQUIRE
Attorney for Petitioners

APPENDIX

APPENDIX "A"

UNITED STATES of America,
Plaintiff-Appellee,

v.

Thomas Clinton MARTIN and
Thomas Ray Martin,
Defendants-Appellants.

No. 77-2884
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

June 16, 1978.

Defendants were convicted in the United States District Court for the Southern District of Florida, at West Palm Beach, Charles B. Fulton, J., of conspiracy to import marijuana into the United States from the Bahamas and to possess marijuana with intent to distribute, and they appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that defendants' convictions were not invalid on grounds of former jeopardy.

Affirmed.

*Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

Criminal Law — 200(1), 201

Defendants' convictions for conspiracy to import marijuana into United States from Bahamas and to possess marijuana with intent to distribute were not invalid, as being barred by former jeopardy, despite their prior Bahamian convictions resulting from same general set of facts; convictions likewise did not violate federal policy against second prosecution for same offense. Comprehensive Drug Abuse Prevention and Control Act of 1970, §1013, 21 U.S.C.A. §963.

Appeal from the United States District Court for the Southern District of Florida.

Before THORNBERRY, GODBOLD and RUBIN, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Appellants, father and son, were convicted upon a bench trial of a conspiracy to import marijuana into the United States from the Bahamas and to possess marijuana with intent to distribute it, in violation of 21 U.S.C. §963. On appeal, they contend that the district court erred in denying their motions to dismiss the indictment on grounds of former jeopardy; and that their convictions were obtained in violation of the federal policy against multiple prosecutions for the same offense. Finding no merit in these contentions, we affirm the judgments appealed from.

The appellants pleaded guilty in a Bahamian court to charges of conspiracy to import dangerous drugs (marijuana) into the Bahamas, conspiracy to export

dangerous drugs from the Bahamas, and possession of dangerous drugs. After serving prison terms and paying fines in the Bahamas, appellants returned to the United States to answer to its indictment.

The Bahamian convictions resulted from the same general set of facts as those charged in the United States although the indictments vary in some details, such as the dates when the conspiracies began and ended. But that does not in itself establish former jeopardy.

To sustain a defense of former jeopardy based on the Fifth Amendment it must be shown that:

1. Both tribunals derived their authority and jurisdiction from the same sovereign; and

2. Both prosecutions were for the same offense. *Brown v. United States*, 5 Cir. 1977, 551 F.2d 619, 620; *United States v. Vaughan*, 5 Cir. 1974, 491 F.2d 1096. Successive prosecutions by the federal Government and a State for the same offense are permissible, because they are separate sovereigns. *United States v. Vaughan, supra*. This rule has been reiterated by the Supreme Court in several cases, notably *Bartkus v. Illinois*, 1959, 359 U.S. 121, 128-29, 79 S.Ct. 676, 681, 3 L.Ed.2d 684, and *Abbate v. United States*, 1959, 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729. See also *United States v. Wheeler*, 1978, — U.S. —, 98 S.Ct. 1079, 55 L.Ed.2d 303 holding that a conviction by a Navajo Tribal Court did

not bar a subsequent conviction on the same facts in a federal court since they were not arms of the same sovereign.

The Bahama Islands are in no respect under the sovereignty of the United States. They are an independent commonwealth. The rule of *Abbate* applies a *fortiori*.

Moreover, though the offenses charged may be considered to originate in the same plan, they were not identical: a conspiracy to import marijuana into and export it from the Bahamas is not the same as a conspiracy to import marijuana into the United States and to possess marijuana with intent to distribute it, as charged in the federal indictment. Each of these offenses obviously would require proof of some facts that would not be necessary as to the others.

Appellants contend that, because of concerted action between the Bahamian government and the United States, their successive convictions should be treated as if they were obtained by the same sovereign. In *Bartkus* the Supreme Court observed that such a conclusion might result where there had been federal-state cooperation on a prosecution if the cooperation were so extensive that the state court system was merely a tool for the federal government. 359 U.S. at 123-24, 79 S.Ct. at 678.

We need not decide whether *Bartkus* extends to joint efforts of the United States and another national sovereign, for there was no joint effort at prosecution here. The Bahamian prosecutions resulted from the fortuitous discovery of a cache of marijuana while their police were investigating a helicopter crash and the later

confessions obtained from appellants. Appellants testified below that no United States agents had any part in obtaining these confessions, nor does it appear that the United States Government contributed in any substantial way to appellants' Bahamian convictions.

The Constitution of the United States has not adopted the doctrine of international double jeopardy. See *Bartkus, supra*, 359 U.S. at 128, note 9, 79 S.Ct. at 680-681, 3 L.Ed.2d at 690, rejecting both international double jeopardy and notions of restraint due to comity, cf. *United States v. Furlong*, 1820, 18 U.S. (5 Wheat.) 184, 197, 5 L.Ed. 64, which dealt with the offenses of piracy, which it defined as robbery committed on the seas, and murder on the seas. The Court there observed, "Robbery on the seas is considered as an offense within the criminal jurisdiction of all nations." 18 U.S. (5 Wheat.) at 197. It concluded that, therefore, a plea of *autrefois acquit* relative to that offense would be good in any civilized state—but that the rule with regard to murder was otherwise. A conspiracy to import marijuana into the Bahamas and a separate conspiracy to import marijuana into the United States cannot be united under one umbrella, nor are these acts the subject of universal agreement among nations. Nor does any notion of comity bar the instant prosecution.

Finally, appellants contend that their convictions violate the established federal policy against a second prosecution for the same offense, known as the *Petite Policy* of the Department of Justice. *See Petite v. United States* 1960, 361 U.S. 529, 80 S.Ct. 450, 4 L.Ed.2d 490. While the record fails to indicate that this

point was presented below,[1] the defense did cite *United States v. Jones*, 1975, 174 U.S.App.D.C. 34, 527 F.2d 817, which mentions the policy, in their brief in support of the motion to dismiss. This case was cited, however, only for the proposition, "[s]ince successive prosecutions on identical or lesser included D.C. and federal offenses emanate from the same sovereignty, they are precluded by double jeopardy considerations." 174 U.S.App.D.C. at 38, 527 F.2d at 821. Since only a legal issue is presented, it can be decided on the record, and this procedure may avoid post-trial motions to do so.

The *Petite* Policy simply has no application to this case. Since the policy serves to protect interests that would be embraced by the Double Jeopardy Clause but for the "double sovereignty" principle of the federal system, it has been appplied only to duplicating state and federal prosecutions or successive federal prosecutions and not to convictions by a foreign nation. The Supreme Court has interpreted the policy as a limit on successive prosecutions for the same offense, a situation not present here. *Rinaldi v. United States*, 1977, — U.S. —, 98 S.Ct. 81, 82 (note 5), 85, 54 L.Ed.2d 207. Moreover, the coup de grace was put to this argument by our recent decisions in several cases, summarized in our opinion in *United States v. Nelligan*, 5 Cir., May 19, 1978, 573 F.2d 251, slip opinion page 4177, 4181, in which we said, "[T]he *Petite* policy is intended to be no more than self-regulation on the part of the Department of Justice. . . . This court has recognized that *Petite* is an internal policy of self-restraint that should not be enforced against the government. See *Fry v. United*

[1]Ordinarily issues not presented below will not be adjudicated on appeal. *Chunn v. Clark*, 5 Cir. 1971, 451 F.2d 1005, 1007.

States, 5 Cir. 1978, 569 F.2d 303, 306; *United States v. Hayles*, 5 Cir., 492 F.2d 125, 126, *vacated on other grounds*, 419 U.S. 892, 95 S.Ct. 168, 42 L.Ed.2d 136 (1974)." (footnotes omitted)

Finding no merit to appellants' contentions on appeal, nor reversible error relative to any other aspect of the case, we AFFIRM the judgments appealed from.

AFFIRMED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

August 18, 1978

TO ALL PARTIES LISTED BELOW:

NO. 77-2884 —

U.S.A.

v.

THOMAS CLINTON MARTIN,
ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, *and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

*on behalf of appellants, T. C. MARTIN, ET AL.,

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk

By /s/ BRENDA M. HAUCK
Deputy Clerk

bmh

cc: Mr. Lawrence S. Katz
Ms. Karen Atkinson